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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ESTEBAN TABAREZ, Defendant and Appellant.	B246083 (Los Angeles County Super. Ct. No. PA068913)

APPEAL from a judgment of the Superior Court of Los Angeles County. David B. Gelfound, Judge. Affirmed.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Yun K. Lee and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Esteban Tabarez was convicted by a jury of first degree murder under a felony-murder theory predicated on attempted carjacking. He contends the trial court erred in instructing the jury on felony-murder because insufficient evidence supported the finding that he attempted to carjack the victim. We disagree and affirm.

Background

On November 6, 2010, Tabarez's car had been inoperable for about a week, and he was frustrated he was unable to drive anywhere. He told his girlfriend he wanted a car, and joked he would carjack someone or change someone's will to inherit their car.

That night, Tabarez invited the victim, Zachary Leon, whom he did not know personally but had met online, to his house to attend his landlord's birthday party. Leon arrived around 7:00 p.m. Around 11:00 p.m., they drove to a McDonald's in Leon's car to get food from the drive through, then drove to a freeway overpass to talk. At 11:17 p.m., Tabarez's girlfriend sent him a text message that said "Good night?," inquiring if he was going to bed. At 11:18 p.m., Tabarez responded, "No. I love you. I might make someone disappear tonight." When she responded asking what he meant, Tabarez texted her at 11:28 p.m., "I will have a car tonight." Tabarez admitted that when he sent both messages he and Leon were in Leon's car.

Leon later drove them back to Tabarez's street and parked near his house. At some point the two switched seats, Tabarez sitting in the driver's seat and Leon on the passenger side. At 2:18 a.m., Tabarez called 911 and reported that three men wearing black hoodies attempted to rob him and Leon as they sat in Leon's car. Tabarez told the operator he sprayed one of the robbers with pepper spray and ran, and when he returned, he found Leon's throat had been cut.

When police arrived at 2:25 a.m., they found Leon's body in a pool of blood in the gutter next to a red Honda sedan with its two front doors and trunk open. There was blood on the passenger and driver's seat, the center console, and the passenger side ceiling. Police found a box cutter covered in blood on the center console, a knife covered in blood in the open trunk, and a can of pepper spray in the car.

Leon was pronounced dead at the scene. He had been strangled, beaten, and stabbed 24 times in the head, neck, and body. A stab wound on the left side of his neck severed the jugular vein and carotid artery. He also had blunt force injuries to his skull and face.

Tabarez had significant amounts of blood on him, water on his clothes and hair, and fresh scratches on his face. He volunteered that he had a knife in his pants pocket and one in his boot, neither of which had blood on them. He told detectives three men had approached Leon's car and demanded money. He attempted to pepper spray one of the suspects, but the man grabbed his wrist so that the pepper spray went into his own face. He ran to his house and rinsed his face with water from a garden hose in the front yard. When he returned to the car, he discovered Leon stabbed and lying next to the passenger side of the car. He felt for a pulse on Leon's neck, then called 911.

When detectives confronted him about inconsistencies in his story, namely the amount of blood on him, Tabarez admitted he stabbed Leon around 30 times. He was arrested and taken to the police station, where he was again interviewed.

Tabarez told detectives he and Leon got into a fight when Tabarez mentioned he had a girlfriend. Leon straddled him and attempted to strangle him, so Tabarez removed a box cutter clipped to his belt and stabbed Leon in the back around 30 times. He then got out of the car, walked around the block, and returned to find Leon in the passenger seat confronted by an unknown man. Tabarez attempted to pepper spray the man, who fled.[1] Leon then attacked Tabarez with a knife he had taken from Tabarez. Tabarez felt threatened, so he took the knife away, stabbed Leon, and cut his throat. Tabarez then pulled Leon out of the car and repeatedly slammed his head against the curb. While attacking Leon, Tabarez said, "I hope you die" and "Why won't you just fucking die?"

An information charged Tabarez with the murder of Leon (Pen. Code, § 187, subd. (a)).[2] The information also included the allegation that Tabarez personally used a deadly

[1] Tabarez later admitted there was no third person.

[2] All statutory references are to the Penal Code.

and dangerous weapon, a knife, during the commission of the murder (§ 12022, subd. (b)(1)).

At trial, Tabarez testified he acted in self-defense and had no intent to kill Leon or take his car. The parties stipulated the blood on Tabarez belonged to Leon. Among other instructions, the trial court instructed the jury on first degree murder under a felony-murder theory predicated on carjacking (CALCRIM No. 540A). The jury found Tabarez guilty of first degree murder, and found true the allegation that he used a deadly and dangerous weapon. The trial court sentenced him to 25 years to life for the murder and added a 1-year consecutive term for the weapon finding. Tabarez timely appealed.

Discussion

Tabarez contends the trial court erred in instructing the jury on felony-murder, arguing there was insufficient evidence of an attempted carjacking because no evidence showed he tried to drive Leon's car. We disagree.

"A trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof. [Citation.] We review the trial court's decision de novo." In doing so, "we must determine whether a reasonable trier of fact could have found beyond a reasonable doubt that defendant committed murder" based on a felony-murder theory. (*People v. Cole* (2004) 33 Cal.4th 1158, 1206; § 1093.) That determination must be made without reference to the credibility of the evidence. (*People v. Marshall* (1996) 13 Cal.4th 799, 847.)

"All murder . . . which is committed in the perpetration of, or attempt to perpetrate [certain enumerated felonies including carjacking] . . . is murder of the first degree." (§ 189.) "The mental state required is simply the specific intent to commit the underlying felony [citation] . . . ." (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.) "'There is no requirement of a strict "causal" [citation] or "temporal" [citation] relationship between the "felony" and the "murder." All that is demanded is that the two "are parts of one

continuous transaction." [Citations.]'" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1141.)

Carjacking is the intentional taking of a motor vehicle from another, against his or her will, accomplished by means of force or fear. (§ 215, subd. (a).) For a jury to find a defendant guilty of attempted carjacking, the prosecution must prove the defendant specifically intended to commit the crime of carjacking and took a direct, although ineffectual, act, beyond mere preparation, toward its commission. (See § 21a ["An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission"]; *People v. Rundle* (2008) 43 Cal.4th 76, 138; *People v. Carpenter* (1997) 15 Cal.4th 312, 387.) A defendant's specific intent to commit carjacking may be inferred from the facts and circumstances shown by the evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1130.) As for the requisite act, the evidence must establish the defendant's activities went "beyond mere preparation" and show the defendant was "putting his or her plan into action." (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8.)

Substantial evidence supports the trial court's instruction on felony-murder predicated on attempted carjacking. On the day of the murder, Tabarez's car had been inoperable for a week. He expressed frustration that he had no working car, said he wanted a car, and made comments to his girlfriend about carjacking someone. Later that same day, Tabarez armed himself with four knives (police found two in the car and two on his person) and invited Leon, whom he had met only online, to his home. While sitting in the passenger seat of Leon's car, Tabarez sent his girlfriend two text messages stating, "I might make someone disappear tonight" and "I will have a car tonight." At the time of the murder, Tabarez was sitting in the driver's seat and Leon was in the passenger seat. The evidence indicated a struggle occurred, as Tabarez had fresh scratches on his face and told officers he had been pepper sprayed. From this evidence a jury could reasonably conclude Tabarez invited Leon to his house with the intent to carjack him, and when Leon resisted, Tabarez killed him.

Tabarez argues there was insufficient evidence of an attempted carjacking because no evidence suggested he tried to drive Leon's car. This argument is without merit. To complete an attempted carjacking the defendant need not actually attempt to drive the car, he need only take a direct but ineffectual act, beyond mere preparation, *toward* taking the car. Enticing a person to drive his car to another's house, then killing him there, are direct acts toward taking his car.

Tabarez argues that under the prosecution's theory he intended two separate acts—to kill Leon and take his car. Therefore, he argues, there were two acts and two independent intents on his part, which means there was an insufficient nexus between the killing and attempted carjacking. The argument, such as it is, lacks merit. Felony-murder always involves two acts—a predicate felony and a homicide. Any intent or lack thereof to commit homicide is irrelevant, as the intent to commit the predicate felony suffices. (*People v. Cavitt*, *supra*, 33 Cal.4th at pp. 197-198 [the felony-murder rule "eliminate[s] the need to plumb the parties' peculiar intent with respect to a killing committed during the perpetration of the felony"].) "[A] concurrent intent to kill and to commit the target felony or felonies does not undermine the basis for a felony-murder conviction." (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1141.) The felony-murder instruction was therefore proper.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.